STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1656

Neil N. Lapidus, et al.,
Appellants,

vs.

Lurie LLP,
Respondent.

Filed June 18, 2018
Affirmed
Cleary, Chief Judge

Hennepin County District Court
File No. 27-CV-15-17320

Michael V. Ciresi, Roberta B. Walburn, Barry M. Landy, Michael A. Sacchet, Ciresi Conlin LLP, Minneapolis, Minnesota (for appellants)

William Z. Pentelovitch, Martin S. Fallon, John T. Duffey, Maslon LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

Appellants Neil N. Lapidus and UnderCliff LLC (Lapidus) challenge the enforcement of noncompete agreements resulting in an award of damages to respondent

Lurie LLP (Lurie) as well as the forfeiture of his right to future post-retirement payments, arguing that: (1) the district court applied the wrong legal standard in evaluating the agreements; (2) the agreements are unreasonable and overbroad; and (3) remedy provisions of the contract are unenforceable. We affirm.

FACTS

Lurie is a Minneapolis-based accounting firm founded in 1940. Neil Lapidus is a certified public accountant licensed in Minnesota who formed UnderCliff LLC, a Florida limited liability company, shortly after retiring from Lurie.

Lapidus joined Lurie in 1978, eventually becoming a named partner during his 36 years at the firm. In 2005, Lurie entered a Fourth Restated Partnership Agreement (the Fourth Agreement). At that time, Lapidus was the firm's administrative partner and played a central role in drafting the new agreement. The Fourth Agreement was created after the noncompete provisions of the previous agreement were not enforced at arbitration against a former Lurie employee who went to work for a competitor. All partners, including Lapidus, signed the Fourth Agreement.

The Fourth Agreement includes a retirement-benefits section, which sets out the purpose of the program and the manner in which payments would be calculated and distributed. The post-retirement benefits included a payout of each partner's Accrual Basis Capital Account, monthly payments of "Retirement Benefits" for up to ten years, and de minimis monthly payments of retirement benefits each year after the ten-year period. The primary component of "Retirement Benefits" is the partner's "Total Deferred Compensation." The Fourth Agreement provides that a partner's "Total Deferred

Compensation" is calculated by multiplying his average annual earnings by three. All Retirement Benefits are paid out of Lurie's current and future cash flow and are not funded by profits withheld from, or income deferred by, partners. The receipt of the monthly post-retirement payments during the ten-year period after retirement is linked to the retiring partner's compliance with noncompete provisions through forfeiture clauses.

Section 17 of the Fourth Agreement contains covenants not to compete or solicit employees. The first of these provisions, 17.1(a), provides that a partner will not:

> Directly or indirectly render any Professional Services to any clients who were serviced by the Partnership during the two years immediately prior to the withdrawal or retirement. "Professional Services" means the performance of any of the services being provided by the Partnership or any of its divisions or subsidiaries and without limiting the generality of the foregoing, specifically includes those services listed on Exhibit 2 and any other services which the Partnership may provide in the future, but is not yet providing on the date of execution of this Agreement.

Exhibit 2 is titled the "Family of Services" document and covers 112 services that Lurie provides. The addition of the Family of Services document is the primary difference between the previous partnership agreement and the Fourth Agreement. The inclusion of the Family of Services document was intended to address the vagueness issues of the previous agreement by providing a list of specific services, rather than using catchall terms.

In the event that a partner breaches the former client noncompete, section 17.2(a)(i) provides that:

> Such breaching Partner hereby irrevocably waives the right to receive any payout of any amounts payable under Articles 11 through 14 (including, without limitation, the accrual basis Capital Account and any Deferred

> Compensation). However, such Partner shall continue to be entitled to the payout of the cash basis portion of the Partner's Capital Account. . . . Partner acknowledges that such waiver is not a penalty but is a good faith estimation of liquidated damages considering that the amount of such waiver accrues over time during the Partner's tenure with the Partnership and this parallels the damage that the Partner's competition would cause. . . . The Partners respectfully request that if this matter ever goes to litigation that the court respect this good faith business decision and understand that the Partnership would never have agreed to pay accrual basis Capital Account and Deferred Compensation in these amounts if the Partnership believed that there was any likelihood that a court would refuse to enforce these liquidated damages.

Section 17.2(a)(ii), the liquidated-damages provision, provides that a breaching partner "shall pay to the Partnership (as a purchase price for clients) for a period of five years 25% of the fees earned, directly or indirectly, by the former Partner or the former Partner's firm from work for such clients rendered in violation of Section 17.1(a)."

The next noncompete provision at issue, 17.1(b), provides that a partner will not "[p]rovide Professional Services within 50 miles of any office of the Partnership maintained on the date the person ceased to be a Partner." In the event that a former partner breaches the geographic noncompete, section 17.2(b) provides the same remedy for the breach of the former client noncompete.

In addition to these provisions, section 17.3(e) extends the prohibition on rendering professional services to former clients and provides that:

> If at any time during the term the Partnership is paying accrual basis capital or deferred compensation, a former Partner directly or indirectly renders any Professional Services to any clients who were serviced by the Partnership during the two years immediately prior to the withdrawal or retirement,

> that former Partner shall forfeit any and all rights to receive any remaining payments from the Partnership.

Lapidus played a central role in drafting the noncompete and forfeiture provisions of the Fourth Agreement and recommended its adoption to the rest of the partnership.

Per the mandatory retirement provision of the Fourth Agreement, Lapidus was required to retire on April 30, 2014. To prepare for his retirement, he began transitioning his business to other partners. Lurie created a list of client relationships that needed to be transitioned from Lapidus to others. The process was not completed by his retirement date and Lapidus received an extension through December 31, 2014 to complete the transition. Under the terms of the Fourth Agreement, Lapidus was to receive approximately $11 million in monthly installments over the next ten years.

After his retirement, Lapidus provided services to Border Foods, Delaget, and Twin City Fan as a consultant through UnderCliff LLC. When Lurie learned that Lapidus was serving in a supervisory role at Border Foods, Lurie made multiple requests for Lapidus to provide a list of his duties and responsibilities at Border Foods to ensure that its independence as an auditor was not compromised. Lapidus eventually informed Lurie that his roles and responsibilities were to "coordinate the accounting and financial functions with their director of financial operations and their third party business processing group" and "special projects as set forth by the shareholders with no financial authority or decision making responsibility."

Lurie investigated the extent of Lapidus's role at Border Foods and learned that Lapidus formed UnderCliff LLC and entered into a consulting agreement with Border

Foods, effective January 1, 2015. The agreement stated that UnderCliff LLC would "provide consulting and advisory services" and "may render certain financial advisory services, but it shall not be engaged to render, nor shall it render, public accounting services, which services shall continue to be provided by the public accounting firm [Lurie] through independent CPA's."

Lapidus completed an internal control project for Border Foods and Delaget for the purpose of "evaluating and improving the business office procedures and policies at Delaget as it related to Border." Both "internal control" and "business process improvement" are services listed in the Family of Services document incorporated into the Fourth Agreement. Lapidus also assisted Border Foods in its search for a new Director of Financial Operations and supervised the new hire through an onboarding process—two services provided by Lurie to its clients. Additionally, Lapidus provided direction on accounting and financial matters, directed accounting and financial personnel, consulted on operations-related matters, and monitored financial reports of Border Foods, all services that Lurie provides to its clients. After learning of these activities, Lurie sent Lapidus a notice-of-breach letter, alleging that his work with Border Foods violated their agreement. Lapidus continued to provide professional services to Border Foods after being served with the underlying lawsuit.

Prior to Lapidus's retirement, a part owner of Twin City Fan contacted Lurie to see if Lapidus could help with their family office. Lurie stated that it had no issue with Lapidus working in the family office, so long as it was related solely to family finances and not to Twin City Fan. Lurie later learned that Lapidus assumed a significant role in the Twin City

Fan business, a role that compromised Lurie's independence, requiring Twin City Fan to engage a different accounting firm for its 2015 and 2016 audits.

Lurie filed suit against Lapidus and UnderCliff LLC in October of 2015. A seven-day trial was held in November of 2016. In April of 2017, the district court found that Lapidus's conduct with Border Foods, Delaget, and Twin City Fan breached the noncompete clauses in sections 17.1(a), 17.1(b) and 17.3(e) and that, because of Lapidus's breach, Lurie no longer had to make future payments to Lapidus or UnderCliff LLC under the Fourth Agreement. The district court entered a judgment for money damages in favor of Lurie in the amount of $2,210,819.23 plus $179,743.76 for the post-retirement payments made to Lapidus since the first breach of the agreement (1/1/15), with interest, and ordered Lapidus to pay Lurie 25% of all amounts paid to him or UnderCliff LLC by Border Foods or Delaget for a period of four years (between 12/31/15 and 12/31/19), and Twin City Fan, "or any other Lurie client" over a period of five years (between 12/31/14 and 12/31/19) for services rendered. In August of 2017, the district court denied motions for a new trial and amended findings of fact, conclusions of law and order for judgment made by Lapidus and UnderCliff LLC. This appeal follows.

D E C I S I O N

I. The district court's application of the "business transaction standard" was harmless error.

At trial, Lapidus argued that the noncompete provisions should be evaluated in the context of an employment relationship between Lurie and Lapidus and that the district court should apply the test articulated in *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965). The district court made extensive findings related to the *Bennett* test, but stated that the "business transaction standard" applied to the agreement. The district court concluded that because of the relationship between Lurie and Lapidus, the noncompetes at issue "arose in the context of a business transaction and not in the context of an employment relationship" because "[t]here are no issues of unequal bargaining power or oppressive circumstances" in the agreement. (Emphasis omitted). Appellant contends that this was an error as a matter of law, requiring reversal. We disagree.

"We review a district court's application of the law de novo." *Harlow v. Minn. Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). To prevail on appeal, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Center, Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). Here, Lapidus has established error, but fails to establish prejudice resulting from that error.

In general, restrictive covenants limit one's right to work and earn a livelihood and are therefore "looked upon with disfavor, cautiously considered, and carefully scrutinized." *Bennett*, 270 Minn. at 533, 134 N.W.2d at 898. Minnesota law recognizes two types of noncompete provisions: those arising out of employment contracts and those arising from the sale of a business. In the context of a noncompete arising out of an employment relationship:

> [T]he test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature

> and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.

Id. at 534, 134 N.W.2d at 899. This approach is used in an effort to protect "the average individual employee who as a result of his unequal bargaining power may be found in oppressive circumstances." *Id.* at 535, 134 N.W.2d at 899.

For noncompetes arising out of the sale of a business, the grounds for imposing a stricter test are not generally present, and noncompete agreements are subject to a more lenient examination. *B & Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 816 (Minn. 1979). In the context of the sale of a business, reasonableness is determined by a three-step test:

> First, whether the restriction exceeds the protection necessary to secure the goodwill purchased; second, whether the restriction places an undue hardship on the covenantor; and third, whether the restriction has a deleterious effect on the interests of the general public.

Bess v. Bothman, 257 N.W.2d 791, 795 (Minn. 1977).

Here, the district court blurred the lines between the two tests and erroneously applied the "business transaction standard," stating that because "Minnesota courts generally show greater deference to the decisions made by sophisticated parties to enter into restrictive covenants in connection with business transactions" unless "there is evidence of unequal bargaining power or oppressive circumstances," noncompete agreements "are subject to less scrutiny." There is no precedent allowing a district court to apply the *Bennett* test with "less scrutiny" when the noncompete agreement arises out of an employment context, regardless of an employee's sophistication or bargaining power.

However, any error in applying the "business transaction standard" was harmless because the record establishes that the district court closely scrutinized the noncompetes in accordance with *Bennett*. The district court made extensive findings on the factors of the *Bennett* test and properly considered the presence or absence of unequal bargaining power, Lapidus's sophistication, and his status within the company when evaluating the reasonableness of a noncompete agreement. The district court made extensive findings related to the absence of unequal bargaining power: discussing Lapidus's status as a part owner of the company; his position on the firm's executive committee and as administrative partner during the adoption of the Fourth Agreement; and Lapidus's participation in developing and recommending the adoption of the Fourth Agreement.

This court must ignore a harmless error. Minn. R. Civ. P. 61. Here, the error was harmless because the substantive law applied by the district court reflected the same structure and policy considerations of the *Bennett* test: whether the noncompetes protected legitimate business interests and whether the restrictions were "reasonable" and "no broader than necessary" to protect those interests. The district court properly considered Lapidus's role in the company over the years and his direct role in drafting the agreement.

II. The district court's determination that the noncompete provisions were reasonable was not clearly erroneous.

Lapidus argues that these provisions are unreasonable because they do not serve legitimate business interests and are not properly tailored in scope and duration. The district court found that the noncompetes in sections 17.1(a), 17.1(b) and 17.3(e) are reasonable and necessary to protect Lurie's legitimate business interests. It is not within the scope of our review "to make the essentially factual finding of whether the covenant [not to compete] was reasonable." *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 87-88 (Minn. App. 1985). Accordingly, we will not set aside a district court's determination regarding whether a covenant not to compete is reasonable unless those findings are clearly erroneous. *Id.* at 88.

"[R]estrictive covenants are enforced to the extent reasonably necessary to protect legitimate business interests. Legitimate interests that may be protected include the company's goodwill, trade secrets, and confidential information." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 456 (Minn. App. 2001) (citation omitted). "The validity of the contract in each case must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee." *Bennett*, 270 Minn. at 535-36, 134 N.W.2d at 899-900. "If the court finds the covenant to be necessary, it must consider the reasonableness of the scope of the covenant" and the covenant "must not impose any greater restriction on the employee than is necessary to protect the employer's business." *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 799 (Minn. App. 1993). When examining the reasonableness of a noncompete, district courts consider "the nature and character of the employment, the nature and extent of the business, the time for which the restriction is imposed, the territorial extent of the covenant, and other pertinent conditions." *Id.*

A. Legitimate business interests

The district court found that the noncompete provisions in sections 17.1(a) and 17.3(e) served Lurie's legitimate business interests in protecting its good will and confidential information and that the noncompete provision in 17.1(b) protected its confidential information.

The protection of good will is a legitimate business interest "[w]here the services have been of such a character that the employee's name carries with it the good will of the employer's business." *Menter Co. v. Brock*, 147 Minn. 407, 410, 180 N.W. 553, 554 (1920). "The fact that the good will of patients or customers belongs to the employer entitled him to require an employee, within reasonable limits . . . not to make improper use of the opportunity his employment has given him to acquire that good will." *Granger v. Craven*, 159 Minn. 296, 303, 199 N.W. 10, 13 (1924). It is undisputed that Lapidus built strong and longstanding relationships with many clients—including Border Foods, Delaget, and Twin City Fan—during his time at Lurie. These relationships with clients carried the sort of good will described in *Brock* and *Granger*. The record supports the district court's finding that the former-client noncompete provisions served Lurie's legitimate business interest in protecting its good will.

The district court found that all three noncompetes are enforceable to protect Lurie's confidential information. The district court did not make specific findings about the confidential information Lapidus retained, but found that while Lapidus was administrative partner at the firm, he was responsible for: "(a) managing the business and affairs of Lurie; (b) supporting Lurie's managing partner and other Lurie partners; and (c) administering and managing Lurie's relationships with its legal counsel, banks, health insurance carriers, and professional liability insurance carriers" as well as "guiding the direction of the firm." The protection of confidential information is a legitimate business interest where the former employee had access to or knowledge of "information not readily ascertainable by . . . competitors" and intended to be kept "in house." *Roth v. Gamble-Skogmo, Inc.*, 532 F. Supp. 1029, 1030 (D. Minn. 1982). "[T]he competitive advantage of having such knowledge dissipates slowly" and may justify a longer temporal restriction on competition. *Id.* at 1032. Here, Lapidus's former position as administrative partner and as a member of the executive committee, combined with his decades-long tenure as a partner, demonstrate that he had access to, and direct knowledge of, the sort of confidential information Lurie has a legitimate business interest in protecting. The record supports the district court's finding that all three noncompete provisions served Lurie's legitimate interest in protecting its confidential information.

B. Scope

Lapidus asserts that the provisions are overbroad in scope. The district court found that each provision was reasonable in scope and necessary to protect Lurie's legitimate interests. The district court's determination is supported by the record and is not clearly erroneous.

As to all of the noncompete provisions, Lapidus argues that they restrict noncompetitive activity. We disagree. The district court found that the noncompete provisions restricted "a former partner from rendering Professional Services to a Lurie Client in any capacity, including as a direct employee." (Emphasis omitted). Lapidus argues that this is not "competition" within the meaning of a noncompete. "Competition" is defined as "[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties." *Black's Law*

Dictionary 344 (10th ed.) (2014). Lurie set out its commercial interests in the list of professional services in the Family of Services document. Lapidus gained a commercial advantage over Lurie when he performed multiple services offered by Lurie for a Lurie client. Lapidus competed.

The district court found that the former client noncompete provisions are reasonable in terms of scope and duration. The district court found that these provisions were necessary to protect Lurie's confidential information and good will. We agree. The first former client noncompete found in section 17.1(a) restricts Lapidus from rendering professional services to Lurie clients, who were clients within the two years prior to his retirement, for a term of two years. The second former client noncompete is found in section 17.3(e) and extends the term of the restriction on rendering professional services to former clients for the ten years during which Lapidus was to receive post-retirement payments from Lurie.

When evaluating whether a temporal restriction is reasonable, courts examine "the nature of the employee's work, the time necessary for the employer to train a new employee, and the time necessary for the customers to become familiar with the new employee." *Overholt Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 703 (Minn. App. 1989). In *Overholt*, the contract at issue prohibited the former employee from "soliciting any business from customers he personally serviced while employed" and covered a "two-year period immediately following the termination of the employment relationship." *Id.* at 700. The court found the restriction to be reasonable, emphasizing evidence of the training received by the former employee, his five-year term employment, and his close contact and good relationships with customers. *Id.* at 702-04.

Here, the restrictions are broader than those at issue in *Overholt*, but the supreme court has previously held that an "active solicitation" clause is not required where "one has conducted a business in the same area for many years and has built a sizeable clientele." *Haynes v. Monson*, 301 Minn. 327, 330, 224 N.W.2d 482, 484 (1974). Under those circumstances, "[s]olicitation by mere reputation and past business practices is more than sufficient." *Id.* Here, the nature and extent of Lapidus's client relationships and the time it would take for a different Lurie partner to assume that relationship weigh in favor of the temporal restrictions. Moreover, unlike in *Overholt*, Lapidus was being compensated for his compliance with the former client noncompete during the ten-year term. Lapidus was due to receive substantial monthly payments totaling approximately $11 million for the ten-year term of the former-client noncompete. While the ten-year term is relatively long, it was not unreasonable for Lurie to expect Lapidus to adhere to the terms of the agreement while he continued to receive approximately $90,000 per month in exchange for his continued loyalty.

The district court found that the geographic noncompete was properly limited in scope and duration to protect Lurie's legitimate business interests. We agree. The geographic noncompete restricted Lapidus from "rendering professional services" within 50 miles of the Lurie offices, for a two-year term. The district court found that this provision was necessary to protect Lurie's confidential information. As discussed above, the competitive advantage of the extensive in-house knowledge Lapidus possessed "dissipates slowly," and broader restrictions have been held to be reasonable where such knowledge is at issue. *Roth*, 532 F. Supp. at 1032. In *Roth*, the noncompete provision at issue was an agreement between an employer and its former chief executive officer. *Id.* at 1030. The agreement provided that Roth would receive substantial monthly payments over a term of five years and that he would refrain from seeking employment with any competing business in the employer's market territory. *Id.* at 1031. The employer's market territory spanned over six states. *Id.* Roth sought to have the agreement declared unenforceable prior to any breach of the terms of the agreement. *Id.* at 1032. There, the federal court determined that the noncompete was enforceable, in part because of Roth's extensive knowledge of the employer's business and his "access to the long range plans of the company" and the fact that "such knowledge dissipates slowly." *Id.*

Here, the geographic noncompete is less restrictive in geographic scope and shorter in duration than that in *Roth*. And while it extends to the provision of professional services generally, the two-year term and 50-mile restriction are not unreasonable given the nature of Lapidus's extensive knowledge and information about Lurie's external relationships and internal processes.

Accordingly, we conclude that the district court did not clearly err in determining that the noncompete provisions were reasonable and necessary to protect Lurie's legitimate business interests in protecting their confidential information and good will.

III. The remedies provided for the breach of the noncompete provisions are enforceable.

Lapidus argues that the remedies of the Fourth Agreement providing for the forfeiture of his future post-retirement payments and the payment of 25% of his earnings from competitive activities are disproportionate and unenforceable penalties. We disagree.

"A contract's construction and its legal effect are questions of law for the court" and "[t]his court need not defer to the [district] court's determination of a legal question." *Lakeview Terrace Homeowners Ass'n v. Le Rivage, Inc.*, 498 N.W.2d 68, 72 (Minn. App. 1993). We conclude that section 17.2(a)(ii) is an enforceable liquidated-damages provision[1] and that sections 17.2(a)(i), 17.2(b), and 17.3(e) are valid forfeiture-for-competition clauses.

First, we address the liquidated damages provision of section 17.2(a)(ii). Minnesota courts have "long regarded provisions for liquidated damages as prima facie valid on the assumption that the parties in naming a liquidated sum intended it to be a fair compensation for an injury caused by a breach of contract and not a penalty for nonperformance." *Gorco Constr. Co. v. Stein*, 256 Minn. 476, 481, 99 N.W.2d 69, 74 (1959) (footnote omitted). Liquidated-damages provisions will not be enforced unless "'(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate

[1] Lapidus argues that the liquidated-damages clause of section 17.2(a)(ii), combined with the forfeiture provisions, is an unenforceable double damages provision. Lapidus did not raise this argument below and therefore we need not reach it here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

estimation.'" *Id.* at 482, 99 N.W.2d at 74-75 (quoting Restatement (First) of Contracts § 339) (1932)). A provision for stipulated damages is an unenforceable penalty if the damages "are so great as to bear no reasonable relation to the amount of actual injury suffered by the breach." *Stanton v. McHugh*, 209 Minn. 458, 461, 296 N.W. 521, 522 (1941). "The controlling factor, rather than intent, is whether the amount agreed upon is reasonable or unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *Gorco*, 256 Minn. at 482, 99 N.W.2d at 74. "[W]hen the measure of damages . . . is susceptible to definite measurement, we have uniformly held an amount greatly disproportionate to be a penalty." *Id.* at 483, 99 N.W.2d at 75.

Section 17.2(a)(ii) provides that a former partner who violates the former client noncompete must pay 25% of all fees earned from work for former clients for a period of five years. The district court found that the harm suffered by Lurie as a result of Lapidus's breach was "difficult, if not impossible, to quantify" because Lurie lost the opportunity to grow its relationships with its clients. The scope of Lurie's lost opportunity is indeed difficult to quantify because that lost opportunity may continue to affect Lurie's relationships with clients that Lapidus serviced for years to come. Further, the provision requires the payment of 25% of the fees received by Lapidus from former clients,[2] linking the measure of damages directly to the amount of compensation Lapidus earns from the

[2] Lapidus maintains that he has not received any compensation for any services rendered to Border Foods, Delaget, or Twin City Fan.

breach of the noncompete provisions. Accordingly, we conclude that the liquidated-damages provision in section 17.2(a)(ii) of the Fourth Agreement is valid and enforceable.

Turning to the forfeiture provisions, we recognize that "forfeitures under covenants against competition are not favored and those claiming them must show that the equities are on their side." *Harris v. Bolin*, 310 Minn. 391, 393, 247 N.W.2d 600, 602 (1976). Where a contract provides a forfeiture, "the provision will be strictly construed." *Naftalin v. John Wood Co.*, 263 Minn. 135, 148, 116 N.W.2d 91, 100 (1962) (quotation omitted). Forfeitures will not be enforced when "great injustice would be done" and when the party "seeking the forfeiture is adequately protected without the forfeiture." *Hideaway, Inc. v. Gambit Invs. Inc.*, 386 N.W.2d 822, 824 (Minn. App. 1986). Forfeitures will only be enforced "where the right to such forfeiture is plain." *Id.*

Here, the language in section 17.3(e) is plain: a partner "forfeit[s]" retirement payments if he "renders any Professional Services" to former Lurie clients. Section 17.2 is less clear, providing that the partner "irrevocably waives" the benefits in the event that he "breaches" the former client noncompetes. The provisions restrict the same conduct (rendering professional services to former clients) and provide the same remedy for breach (surrender of the right to future post-retirement payments). Read together, these provisions establish Lurie's right to forfeiture.

Lapidus argues that enforcement of the forfeiture provisions is improper because it results in the forfeiture of a vested retirement benefit, relying on *Harris*. There, the court found that the noncompete agreement and forfeiture clause were unenforceable because they were "not limited as to time, harm to the employer, or geographical area." *Harris*, 310 Minn. at 395, 247 N.W.2d at 603. Here, as discussed above, the noncompete provisions are properly limited in scope and necessary to protect Lurie's legitimate business interests. Further, *Harris* involved the forfeiture of funds that consisted of portions of the employee's profit-sharing plan that were "not a gratuity but constitute[d] deferred compensation for services rendered." *Id.* at 393, 247 N.W.2d at 602. Here, unlike in *Harris*, the post-retirement payments do not come from funds that were deferred or otherwise withheld from Lapidus while he was a partner at Lurie. Rather, the post-retirement payments provide consideration for Lapidus's continued loyalty and compliance with his noncompetes.

Additionally, Lurie would not be adequately protected without the forfeiture provisions. The liquidated-damages provision serves to protect Lurie's lost revenue resulting from competition by former partners during the two-year term. The forfeiture provisions, on the other hand, serve to protect the viability of Lurie's post-retirement payment program as a whole. The district court found that Lurie's post-retirement payments are unfunded and paid out of its current and future cash flow and that competition from former partners disrupts Lurie's ability to fund the post-retirement payment program. The forfeiture provisions ensure that a partner cannot both compete with the company and receive the post-retirement payments meant to secure their loyalty.

Finally, enforcement of the forfeiture provisions will not result in great injustice. Lapidus controlled whether he would continue to receive monthly post-retirement payments of approximately $90,000 from Lurie and refrain from rendering professional services to former clients or render professional services to former clients and forfeit his right to those monthly payments. Under the Fourth Agreement, an agreement which he developed and recommended for adoption, he could not do both.

Affirmed.